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80-2074

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS,

Petitioner,
Proceeding Pro. Se.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT, UNIT B

CHARLES W. WORRELL
1111 Tarrytown Lane
West Columbia, South Carolina 29169
(803) 796-0811

THE QUESTIONS PRESENTED

1. Whether the Court of Appeals' Order affirming the District Court's decision to issue a Civil contempt Order without granting me a new trial and an opportunity to present evidence in my behalf:

   (a) violated my constitutional right to due process; and

   (b) was contrary to Federal Rule of Civil Procedure 63 and the cases interperting this rule in the Second and Sixth Circuit Courts of Appeals.

2. Whether the Court of Appeals grievously erred by concluding that I discriminated against blacks in renting my apartments when the sole basis for this conclusion was the Court's reliance upon government affidavits which were never served upon me nor properly filed with the lower Court. This action of the Court of Appeals:

   (a) was contrary to Federal Rule of Civil Procedure 43; and

   (b) unfairly denied me the opportunity to confront the evidence and witnesses against me.

THE PARTIES

Charles W. Worrell, d/b/a
Cherokee Homes Apartments

United States of America

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II. Despite the fact that the government has never produced a single bona fide black applicant who has ever been denied housing at my apartment complex, and despite the fact that I have never discriminated in renting my apartments, the Fifth Circuit Court of Appeals erroneously relied upon affidavits which were never served upon me nor properly filed in the lower Court to conclude that I discriminated against blacks 7
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS,

Petitioner,
Proceeding Pro Se

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B

The petitioner, Charles W. Worrell, d/b/a Cherokee Homes Apartments, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, Unit B, rendered in these proceedings on March 13, 1981. Petition for rehearing before the Fifth Circuit Court of Appeals was denied by its Order dated April 13, 1981

OPINIONS BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals, not published, appears at Appendix A, *infra,* p.p. 1a - 4a. This opinion affirms the judgment of the District Court for the Southern District of Georgia finding me in civil contempt of the Court's previous Order. The District Court opinion appears at Appendix B, *infra,* p.p. 6a - 17a.

JURISDICTION

The Order or judgment of the Fifth Circuit Court of Appeals was rendered on March 13, 1981, See Appendix A, *infra,* p.p. 1a - 4a. This Petition for Certiorari was filed less than 90 days from this date. The jurisdiction of this Court is invoked under 28 USC 1254 (i).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment - "No person shall be.....deprived of life, liberty, or property without due process of law."

STATUTES INVOLVED

Civil Rights Act of 1968 42 USC 3601 et seq.

RULE OF PROCEDURE INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE 43 - "In all trials the testimony of witnesses shall be taken orally and in open Court.... All evidence shall be admitted which is admissable under the statutes of the United States, or under the rules of evidence heretofore applied in the Courts of the United States on the hearing of suits in equity....."

FEDERAL RULE OF CIVIL PROCEDURE 63 - "If by reason of death.... a judge before whom an action is tried is unable to perform the duties to be performed by the Court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge..... may perform those duties; but if such judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

STATEMENT OF THE CASE

In 1972, Mary Davis, a black woman representing the Economic Opportunity Authority of Savannah, Chatham County, Inc., and another black woman, Sandra Moon came to me at the Cherokee Homes office and demanded that I allow them to set up and establish a sewing school at the Cherokee apartment complex. These two women further demanded that my office building in which they wanted to operate the school and all utilities be given to them free of any charges. No rents, No electric bills, No gas bills and no telephone bills would be paid by them or the Economic Opportunity Authority of Savannah, Chatham County, Inc. These demands were made with the statement being made to me by Mary Davis that if I did not comply and give them the use of my office building for the sewing school rent and expense free, that she would put me in serious trouble with the civil rights people in Washington. I did not and could not comply with these demands because the City of Port Wentworth zoning law where these apartments are located forbids any type of business, school, or use other than apartments on the property which they demanded the use. Very soon thereafter, acting upon a complaint from Mary Davis, the representative of the Economic Opportunity Authority of Savannah, Chatham County,

Inc., and without reasonable cause to believe that I had discriminated against any *bona fide black applicant* in the rental of my apartments, the United States of America brought suit against me for alleged violation of the Civil Rights Act of 1968, 42 USC 3601 et seq. Without any finding whatsoever that I had ever discriminated in any manner in the rental of my apartments, The District Court for the southern District of Georgia ordered that I comply with certain procedural requirements for a period of three (3) years. I substantially complied with the Court order and with the requirements thereof.

In 1977 just one month before this three (3) year period was to expire, the United States of America brought suit alleging that I was in civil contempt of the 1974 District Court Order. In June, 1978, District Court Judge Alexander A. Lawrence held a hearing in this Civil contempt case. One year and two months later Judge Lawrence died without ruling in this case, and without issuing any findings of facts or conclusions of law whatsoever.

Approximately two months later the newly appointed District Court Judge B. Avant Edenfield issued a rule and Order to show cause on the United States to show cause why this case should not be dismissed for lack of prosecution. Judge Edenfield held a hearing on this Order and rule to show cause on November 2, 1979. As I understood it, the only purpose and reason for this hearing on November 2, 1979, was for the Court to make a determination on the issued rule to show cause against the government as to whether or not this case would be dismissed for lack of prosecution. However, without giving me any prior notice whatsoever and without ever considering the lack of prosecution claim which was the only purpose of this hearing, the District Court ruled on the Civil contempt action. The District Court did not hold a

new evidentiary hearing, nor did the District Court give me an opportunity to present evidence on my behalf. Despite the fact that the government had never produced a single black person who had ever been denied an apartment at my apartment complex, and despite the fact that I had never discriminated in the renting of my apartments, Judge Edenfield refused to rule and did not rule on the lack of prosecution claim before him; instead, he issued a civil contempt Order against me based on the prior record and proceedings held before the deceased Judge, The Honorable Alexander A. Lawrence.

The Fifth Circuit Court of Appeals affirmed the District Court Order. In footnote (1) of its opinion the Court relied on *Arrow Hart, Inc. vs. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) as authority for the proposition that Judge Edenfield could enter an Order based on a prior existing record even though deceased Judge Lawrence made no findings of facts or conclusions of law. I never agreed or stipulated to Judge Edenfield issuing a ruling based upon the prior record taken before Judge Alexander A. Lawrence. (See Appendix C). *Arrow Hart,* however, and a decision similar to it in the Second Circuit, stands for the proposition that a new trial is required when a party to a proceeding does not agree to the Court's ruling on the prior record made before a deceased Judge, which are the true and absolute facts in this case.

In footnote (2) of its Order, the Court of Appeals relied upon affidavits which were never served upon me nor properly filed with the lower Court to find "ample evidence that (I) discriminated against blacks in renting (my) apartments." I have never discriminated against blacks, and it is unfair and unjust of the Court to rely on out of Court, unsubstantiated and unchallenged affidavits to reach this conclusion. In fact, I did not know affidavits existed until the Court of Appeals rendered its opinion and made reference to them in its findings.

ARGUMENT

I.

THE FIFTH CIRCUIT COURT OF APPEALS EITHER MISAPPLIED THE *ARROW HART* CASE AND IN SO DOING VIOLATED MY DUE PROCESS RIGHTS AND RULE 63 OF THE FEDERAL RULES OF CIVIL PROCEDURE, OR THE COURT ESTABLISHED *A NEW RULE OF LAW* WHICH IS DIRECTLY CONTRARY TO HOLDINGS IN THE *SECOND* AND *SIXTH* CIRCUITS AND THIS CONFLICT IN DECISIONS BETWEEN CIRCUIT COURTS OF APPEAL SHOULD BE RESOLVED.

Arrow Hart, Inc., vs. Philip Carey Co., 552 F2d 711 (6th Cir. 1977) clearly held that in absence of a unanimous agreement by the parties and where there is no oral or written expression of the deceased judge concerning findings of fact and conclusions of law, Rule 63 of the FRCP required that a new trial be held. This opinion is supported by other jurisdictions. See *Bromberg v. Moul* 275 F2d 574 (2nd Cir. 1969); *Brennan v. Grisso*, 91 U.S. App. D.C. 101, 198 F2d 532 (1952).

The Fifth Circuit Court of Appeals used the *Arrow Hart* case to reach a result that was not consistent with the *Arrow Hart* holding. In my case, the deceased Judge, The Honorable Alexander A. Lawrence, never made any findings of fact or conclusions of law. Also I never agreed, at any time or in any manner that Judge Edenfield rule on the record of the Civil Contempt hearing held before Judge Alexander A. Lawrence. Moreover, I consistently maintained during the hearing before Judge Edenfield on the Rule to Show Cause on November 2, 1980 that the government's case of Civil Contempt against me be dismissed for lack of prosecution. I also, consistently tried to move the Court to make a ruling on the Lack of Prosecution issue before Court at that time. However, Judge Edenfield never ruled on his Order and Rule to Show Cause against the government, which was

the reason and purpose of the hearing on November 2, 1980, in the first place.

It is my position that the District Court misled me by ordering that it would hold a hearing on the lack of prosecution issue, but instead this Court went on further then and there, to deny me my constitutional right to a due process hearing on the charge of civil contempt and thereby violated FRCP 63 by issuing an order in the civil contempt case without holding a new trial in which I would have had time to prepare a defense. The Court of Appeals erroneously upheld this error by finding Judge Edenfield's Order was warranted under the *Arrow Hart* case. By relying on *Arrow Hart,* the Court of Appeals either misapplied the *Arrow Hart* holding or established *a new rule of law* that directly conflicts with holdings in the *Second* and *Sixth* Circuit Courts of Appeals. By denying me a new trial, the Court violated my constitutional right to due process of law and violated Rule 63 of FRCP and relevant case law.

II.

DESPITE THE FACT THAT THE GOVERNMENT HAS NEVER PRODUCED A SINGLE BONA FIDE BLACK APPLICANT WHO HAS EVER BEEN DENIED HOUSING AT MY APARTMENT COMPLEX, AND DESPITE THE FACT THAT I HAVE NEVER DISCRIMINATED IN RENTING MY APARTMENTS, THE FIFTH CIRCUIT COURT OF APPEALS ERRONEOUSLY RELIED UPON AFFIDAVITS WHICH WERE NEVER SERVED UPON ME NOR PROPERLY FILED IN THE LOWER COURT TO CONCLUDE THAT I DISCRIMINATED AGAINST BLACKS.

Since the beginning of the government's action against me I have maintained that I have never discriminated against blacks in renting my apartments, and the government to this day has never produced a single bona fide

black applicant who has claimed that I discriminated against him. In footnote (2) of its Order the Fifth Circuit Court of Appeals relies upon "affidavits" allegedly submitted in support of the government's motion for preliminary injunction to find "ample evidence" that I discriminated against blacks. These alleged "affidavits" were not attached to the copy of the motion for preliminary injunction served upon me. These Affidavits were never before the District Court because there was neither an evidentiary hearing held nor any ruling made on the motion for preliminary injunction, there was no preliminary injunction ever issued. In fact, the first time I learned of these affidavits was when the Court of Appeals referred to them in it's footnote. These claimed affidavits which were never served upon me nor properly filed in the District Court with a true Affidavit of Service upon me, were apparently sent as part of the official record from the District Court to the Court of Appeals. How they became a part of the record I do not know.

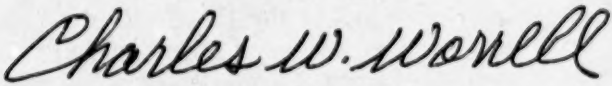
The alleged "affidavits", as well as the affiants who gave the affidavits, were never presented against me. I had no knowledge of them. I never had the opportunity to question or cross-examine the affiants. At no time were the contents of these affidavits revealed to me, nor were the affiants ever presented before the District Court.

By relying on these affidavits, the Court of Appeals unfairly and most unjustly found sufficient evidence to find me guilty of discrimination and civil contempt. This was a grievous error because none of these affidavits would be admissable against me under FRCP 43. Most importantly, determinations should not be left to unchallenged affidavits that were never properly filed or served upon me as outlined in *Locklin vs. Switzer Bros., Inc.*, C.A. Cal. 1965, 348 F. 2d 244, on remand 261 F. Supp. 528.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,



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May 11, 1981

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7118
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

---

(MARCH 13, 1981)

Before HILL, FAY and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

Charles Worrell (appellant) appeals *pro se* from the judgment of the district court finding him to be in civil contempt of the court's previous injunction. Appellant is the owner of an apartment complex in Port Wentworth, Georgia. On July 8, 1974, he was adjudged to be in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601, *et seq.*, for discriminating against blacks in renting apartment units. In addition to enjoining appellant, his agents and employees from further discrimination, the order also compelled appellant to take certain remedial measures to

assure compliance. He was required to advise certain organizations that he did not discriminate in renting his apartments, to educate his employees on the requirements of federal antidiscrimination laws, and to make periodic reports. No appeal was taken from this order. Almost three years later, the government brought this action to hold appellant in civil contempt of the 1974 order. A hearing was held before Judge Alexander Lawrence of the Southern District of Georgia, but he died before entering a final order. The case was reassigned to Judge Avant Edenfield who entered the contempt order based upon the record and transcript of the hearing before Judge Lawrence.[1] We affirm.

[1]It affirmatively appears that Mr. Worrell and the government stipulated that Judge Edenfield could enter an order based upon the existing record without necessity of a new trial. (R. vol. V at 6-11). *See Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977).

Aside from appellant's unavailing attack on the predicate injunction,[2] the only[3] issues for review are (1) whether the district court's finding appellant in civil contempt is clearly erroneous and (2) whether the United States is entitled to attorney's fees.

[2]Appellant argues generally to this court that he has never discriminated against anyone or violated the fair housing laws. While it is true that a civil contempt cannot be predicated upon the violation of an invalid order, *Louisiana Education Ass'n. v. Richland Parrish School Board*, 421 F. Supp. 973, 977 n.3 (W.D. La. 1976), *aff'd mem.* 585 F.2d 518 (5th Cir. 1978), we conclude that the order of July 8, 1974, as amended, constitutes a valid, enforceable order and that appellant is bound by the order. He did not appeal from the order. In fact, in appears that the order was actually a consent decree by appellant and the government. We have reviewed the record, particularly the affidavits in support of the government's motion for preliminary injunction (R. vol. I at 53-61), and find ample evidence that appellant discriminated against blacks in renting his apartments. His belated challenge to the July 8, 1974, order is of no avail to him at this point.

[3]Appellant raises other issues which we do not discuss, either because they were not raised in the court below or because they are frivolous.

We have reviewed the record and conclude that even under the clear and convincing standard,[4] the decision of the district court is not "clearly erroneous." No blacks have ever occupied any of appellant's apartments, either before or after the injunction. This fact is due in part to appellant's failure to comply with various remedies set forth in the injunction. Representatives of four of the five organizations to be notified by appellant of his non-discriminatory housing policy testified that they never received such a notice until May, 1977, about the time the petition for civil contempt was filed. The order required that the notices be transmitted to these organizations within 90 days of the date of the order, July 8, 1974. Appellant did not properly educate his employees on the requirements of the order and the fair housing laws.[5] It appeared without contradiction that appellant deviated from the rental standards established by the order. It appeared, also without contradiction, that appellant failed to file timely reports and that the reports failed to contain all of the required information, *i.e.*, they did not contain the details of each "inquiry" about an apartment.[6] The contempt was therefore established by clear and convincing evidence.

[4]"Civil contempt proceedings are reviewable under the clear and convincing standard." *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1352 n.8 (5th Cir. 1979).

[5]In fact appellant, who lived in West Columbia, South Carolina rarely if ever personally visited the apartments or his employees. He handled all business over the telephone with his two managers. The testimony of the two managers evidenced little understanding of the requirements of the order.

[6]These remedies, particularly the notification and reporting requirements, are more than mere technicalities, but are important aspects of the remedial order aimed at removing the effects of past discrimination and insuring no future violations occur. Therefore, the failure to comply with these requirements may properly form the basis of a civil contempt. *See United States v. Crimson Apartment Services, Inc.*, 1 EOHC [Equal Opportunity in Housing Cases] ¶13,665 (D. Mass. 1974) (violation of reporting requirement in remedial order under the fair housing laws constitutes a civil contempt.)

As to the second issue, whether the decision to award attorney's fees to the government was proper, we note that attorney's fees are recoverable items of damage in a civil contempt. As we stated under similar circumstances in *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1356 n.23 (5th Cir. 1979),

> *Regardless of whether an award of attorney's fees to the Government would be appropriate in an original* [42 U.S.C.A.] *§3613 proceeding, such an award may be made in the Trial Court's discretion, in a civil contempt action.*

(citations omitted). We find no evidence of abuse of discretion in the decision to award attorney's fees.[7]

[7]The government was given thirty days to present evidence of the amount of attorney's fees. The record on appeal does not indicate whether the district court has ruled upon the exact amount of attorney's fees. Therefore, the question of the amount of attorney's fees is not before us.

Finally, appellant's allegations of bad faith and conspiracy on the part of the government and its attorneys are without merit. The judgment of the district court, including the order of supplemental relief, is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7118

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Georgia

ON PETITION FOR REHEARING
(April 13 1981)

Before HILL, FAY and ANDERSON, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs.

CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS
Defendant

CIVIL ACTION
NO. 3193

I.

BACKGROUND

On October 1, 1973, the United States, pursuant to the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*, brought this action against Mr. Worrell alleging he pursued a policy and practice of discrimination against blacks. The defendant, who owns and operates an apartment complex in Port Wentworth, Georgia, known as Cherokee Homes, denied having violated any provision of federal law.

This Court, after a trial on January 15, 1974, entered an Order on July 8, 1974, which was modified on July 22, 1974.[1] In these Orders the Court, finding a pattern and practice of discrimination, enjoined the defendant and his agents from engaging in racially discriminatory housing practices. The Court required Mr. Worrell to undertake an affirmative program to promote equal housing opportunity. The defendant was ordered to submit

1. These modifications do not affect the issues now presented.

periodic reports to the Court and to the Department of Justice. The Court retained jurisdiction of this action for all purposes.

On May 3, 1977, the United States moved the Court to hold Mr. Worrell in civil contempt and to grant supplemental relief. The matter was set for hearing by an Order to Show Cause, dated June 14, 1978. The United States alleged that the defendant failed to comply with the Order entered by this Court on July 8, 1974 by:

> (A) Failing to notify the organizations set forth in paragraph B(4) of the Order of his non-discriminatory rental policy;
>
> (B) Failing to adhere to the rental standards, as required by paragraph (C) of the Order; and
>
> (C) Failing to submit reports to the Court, as required by provisions on pages 6 and 7 of the Order, which reports were to include:
>
> (1) the names of persons who made inquiry and who were offered applications for apartments,
>
> (2) the disposition of applications, and
>
> (3) the vacancies by apartment number and date.

An evidentiary hearing was held on June 30, 1978. After the hearing but before issuing a decision, the Honorable Alexander A. Lawrence, who had heard the case on the merits in January, 1974, and who presided over the June, 1978 hearing, died. By stipulation of the parties, made in open court on November 2, 1979, the motion for contempt and for supplemental relief was submitted to the Court on the record of the June 30th hearing.

II.

FINDING OF FACTS

This Court, after considering the evidence, makes the following Findings of Fact and Conclusions of Law, pursuant to Rule 52(a), Federal Rules of Civil Procedure.

1. The Court finds that the Cherokee Homes Apartments, located in Port Wentworth, Georgia, consists of approximately 198 units of unfurnished apartments.

2. The apartments were occupied exclusively by white persons at the time of the bringing of the initial lawsuit in 1973 and at the date of the issuance of the Court's Order on July 8, 1974. The apartments continue to be occupied exclusively by white people and the Court finds that this is due, in part, to defendant's failure to comply with certain of the steps set forth in its July 8, 1974 Order.

3. The defendant failed to timely notify the organizations set forth in paragraph B(4) of the Order that the defendant would rent apartments at the Cherokee Homes Apartments without regard to race, color, religion, or national origin.

4. The defendant has not adhered to the rental standards which were filed with the Court, and apartments were rented to white persons who failed to satisfy one or more of those standards. The defendant has rented apartments to applicants who did not satisfy his announced policy of requiring credit references and who had more than the maximum number of children allowed.

5. The defendant has advised at least one representative of the Economic Opportunity Authority, an organization which is in contact with economically disadvantaged members of the Savannah community, including black persons, that those who apply to be tenants

must satisfy the promulgated rental standards in order to become a tenant.

6. The defendant has altered his rental standards without filing such changes with the Court and without serving plaintiff with a copy of such proposed changes. The alterations include the increase in the number of credit references and the increase on April 1, 1976, in the amount of the security deposit.

7. The defendant has failed to comply with those portions of the Order of July 8, 1974, which require that the defendant report to the Court certain information every three months for three years, in that every person who made inquiry was not reported. Evidently, Mr. Worrell's employees felt free to alter the requirements of the Order because they considered the information required to be unimportant. Neither did the defendant report information about any vacancies occurring during the reporting period. He neglected to report the building and apartment number, the date of availability, and the name and race of each new occupant.

8. The defendant has failed to submit the reports to the Court on a timely basis, as required by the Order of July 8, 1974.

9. The defendant has failed to comply with the provisions of the Order of July 8, 1974, which required him to inform the public generally and his customers and clients specifically of his nondiscriminatory policy. Nor has he conducted an educational program for all of his rental personnel and other agents and employees to inform them of the provisions of the Order and of their duties and obligations under the Fair Housing Act. While the defendant did provide his employees at the Cherokee Homes Apartments with a copy of the July 8, 1974 Court Order, he did not hold a meeting with his employees to

inform them of the provisions of the Order of July 8, 1974, or of the implementation of the initial rental standards which were filed with the Court. Ms. Sigler, one of Mr. Worrell's employees at Cherokee Homes, could not remember if Mr. Worrell mailed or showed her a copy of the Order. Ms. Hickman, the other managerial employee, testified that she received a copy of the Order in the mail. He did not make clear that a record must be kept of each person who inquired about an apartment. It was the responsibility of Mr. Worrell to educate himself and his employees so that the Order could be obeyed. This educational program for the employees is particularly appropriate since neither Mr. Worrell nor his employees admit to knowing even the most elementary facts about the complex. Mr. Worrell's testimony at the hearing was that he himself could not guess within fifty apartments how many rental units existed at Cherokee Homes. Nor did he have any idea how many vacancies might occur within a given period. It should be clear to the defendants that purposeful ignorance is no excuse for neglecting to obey an Order of this Court.

10. Despite the specific Order of this Court that "defendant shall update and maintain in a *conspicuous* manner, a list of actual and expected vacancies and the size and rental price for each unit" testimony was clear that no such listing is maintained where one making an inquiry can see it. It should be clear to Mr. Worrell that the keeping of the list in a part of the office to which the public is not permitted is not sufficient to comply with the Order.

III.

CONCLUSIONS OF LAW

Before the Court is the Government's motion for civil

contempt and supplemental relief. The merits of Judge Lawrence's Orders are not before me, although I do not question the appropriateness of his actions. It is abundantly clear from the transcript of the hearing before Judge Lawrence that Mr. Worrell has not fully complied with the Order of this Court. Nor has he made a good faith attempt to do so.

Civil contempt is a coercive measure designed to enforce compliance with the orders of the court. The purpose of civil contempt is remedial, and such proceedings are intended to coerce the contemnor into doing what he has been ordered to do. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *Northside Realty Associates, Inc. v. U.S.*, 605 F.2d 1348, 1356 (5th Cir. 1979) *("Northside IV")*.

Contempt is a sanction utilized in cases where compliance with an injunctive order issued under the Fair Housing Act has not been attained. *United States v. Pelzer Realty*, 537 F.2d 841 (5th Cir. 1976). Because plaintiff seeks only to compel the defendant to comply with this Court's original injunction which includes an affirmative action program to counteract the effects of his past noncompliance, and does not seek to punish him or his agents, the proceeding is in the nature of civil rather than criminal contempt. See *United States v. Northside Realty Associates, Inc.*, P.H.E.O.H. Rptr. Para. 13,725 (N.D. Ga. August 19, 1975).

Mr. Worrell was under a duty to take whatever action was necessary to insure that his employees complied with the terms of the Order. *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979). The intent of Mr. Worrell in disobeying the injunction is immaterial although Mr. Worrell has candidly admitted in open court that black people are not welcome at Cherokee Homes. The issue is whether Mr. Worrell and

his agents have violated the Order. I find that they did. *McComb v. Jacksonville Paper Co., supra.*

Upon finding a defendant in civil contempt, the Court's powers are broad and are determined by what is necessary to afford full remedial relief. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949).

Relief which is appropriate in contempt proceedings, such as this one for failure to obey orders in cases arising under the Fair Housing Act, has been described in other such cases. In *Northside IV, supra,* at p. 1350, the Court of Appeals for this Circuit upheld the order of the District Court which included a general injunction prohibiting discrimination in housing and required the defendants (a) to certify to the Court that they have read and understand the order, (b) to institute educational and training programs for their employees concerning their obligations under the Fair Housing Act and the Order, (c) to submit reports, including the name, address, date of contact, etc., of black persons and of persons whose race is not known, (d) to make their records available for inspection by the United States during reasonable business hours, (e) to display a fair housing poster in the public area of each office, (f) to include a statement in all advertising that housing is available on a non-discriminatory basis, and (g) to notify the local black real estate board and every member of that organization that it does business with them on the same basis as with other brokers.

This Court is also of the opinion that the United States is entitled to attorneys' fees for its prosecution of the contempt action. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1948); *United States v. United Mine Workers,* 330 U.S. 258, 303-04 (1946). An award of the reasonable expenses incurred by the complaining party in prosecuting the contempt is proper. *Toledo Scale*

Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923); *United States v. Greyhound*, 370 F. Supp. 881, 886 (N.D. Ill. 1974), aff'd 508 F.2d 529 (7th Cir. 1974); *Backo v. Local 281, United Broth. of Carpenters & Joiners of America*, 308 F. Supp. 172, 179 (N.D. N.Y. 1969), aff'd 438 F.2d 176 (2nd Cir. 1970), *cert. den.* 404 U.S. 858 (1971). Such an award is appropriate not only for private parties but also for government agencies. *United States v. Greyhound, supra*, at 886; *N.L.R.B. v. Local 825 I.U.O.E.*, 430 F.2d 1225, 1229 (3rd Cir. 1970). Such awards have been made in Fair Housing Cases contempt matters. *United States v. Northside Realty Associates, Inc.*, P.H.E.O.H. Rptr. Para. 15,237 (N.D. Ga. 1977) in which the court awarded $25,000 in attorney's fees and costs of $4,594.13; aff'd *Northside IV, supra.*

IV

ORDER ON MOTION FOR CONTEMPT AND SUPPLEMENTAL RELIEF

This Court having made findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure, hereby finds the defendant Charles W. Worrell to be in civil contempt for failing to comply with the Order of this Court of July 8, 1974.

Defendant shall be fined $200 per day for each day that he is not in compliance with the Orders of the Court.

(A) Within five (5) days of receipt of this Order, the defendant shall file with this Court an assurance, under oath, that he will hereafter fully abide by all orders of the Court;

(B) Within thirty (30) days of the entry of this Order, defendant shall file with the Court, with copies of the plaintiff, rental standards which ac-

curately describe those utilized by the defendant in the rental of apartments. No exceptions are to be made from these standards.

If the Court makes no contrary ruling *sua sponte*, these standard procedures shall be adopted without further order of the Court. If after the adoption and approval of objective standards and procedure, the defendant desires to alter them he may do so, provided that any changes are objective, in writing, and non-racial in purpose and effect. If any such change is made within three (3) years of the entry of this Order, it shall be filed with the Court, with copies to plaintiff, and any dispute arising from such proposed change may be raised by either party in any subsequent appropriate proceeding in this Court.

In addition, the following directions shall be in effect for three years from the date of this Order:

1. The defendant shall, within fifteen (15) days of this Order, conduct an educational program for all of his rental personnel and other agents and employees to inform them of the provisions of this Order and their duties under the Fair Housing Act. Such persons shall include the following:

(A) A copy of this Order shall be personally furnished to each agent and employee.

(B) By general meeting or individual conference, the defendant shall personally inform each agent and employee of the provisions of this Order and of the duties of the defendant and his agents and employees under the Fair Housing Act.

(C) Each agent and employee shall sign a statement that he or she has read this Order and that he or she fully understands his or her responsibilities thereunder. However, defendant remains responsible for the compliance of his employees.

(D) The above-stated program shall be given within fifteen (15) days of the filing of this Order, and thereafter, upon the hiring of any new employee, within five (5) days of the commencement of his or her duties.

3. The defendant shall cause the word "Equal Housing Opportunity" to be printed or otherwise inserted on each blank application and lease form and on the large sign which presently is posted on the exterior of the building in which the rental office for Cherokee Homes Apartments is located.

4. The defendant shall inform the public generally and his customers and clients specifically of the defendant's nondiscriminatory policy by the following actions:

(A) All advertising of apartments at Cherokee Homes in newspapers or other media including radio and TV and in billboards, pamphlets, brochures, handouts, and writing of any kind, shall include a statement prominently placed and easily legible to the effect that apartments are rented without regard to race, color, religion or national origin.[2]

(B) On the first day of each month, the defendant shall update and maintain in a conspicuous manner on the public side of the counter in his rental office, a list of actual and expected vacancies and the rental price for each unit.

5. The defendant shall report to the Court, with copies to the plaintiff, within thirty (30) days of the receipt of this Order, the steps that he has taken to satisfy the provisions of this Order.

6. IT IS FURTHER ORDERED that with respect to the Cherokee Homes Apartments the defendant shall maintain records containing the information described below in this paragraph and ninety days after the entry of

2. The display of the HUD Equal Housing Opportunity logotype and slogan shall be sufficient to meet the requirements of this Order.

this Order, and at three (3) month intervals thereafter, for a period of three years following the entry of this Order, the defendant shall file with this Court, with copies to the plaintiff, a report containing the following information:

(A) The name, address and race of *each person making inquiry in person* about the availability or rental of a dwelling during the preceding three (3) month period and whether such person:

(a) Was offered an application
(b) Filled out an application
(c) Submitted an application
(d) Made a deposit
(e) Was accepted for a waiting list
(f) Was accepted for occupancy
(g) Was rejected, and if rejected, the reasons therefore, (i.e., the specific criterion which the applicant failed to meet). The report shall also state the date on which each of the foregoing actions was taken.

(B) The defendant shall further report, with respect to each vacancy at the Cherokee Homes Apartments during the reporting period:

(a) The building and the apartment number.
(b) The date the apartment became available for rent.
(c) The date the apartment was occupied by a new tenant and the name and race of the new occupant or occupants.

(C) Additionally, for each apartment unit at the Cherokee Home Apartments, the defendant shall include in the first report the number of persons or

families, by race who are residing there at the time of the entry of this Order.[3]

IT IS FURTHER ORDERED that:

1. The United States is entitled to attorney fees. The United States shall have thirty (30) days from the entry of this Order to present a statement of its reasonable fees and costs. Defendant shall have fifteen (15) days in which to object and at expiration of this time this matter shall be considered submitted to the Court.

2. The defendant's keeping of racial records for the purpose of complying with this Order shall not be considered discriminatory.

3. Representatives of the United States shall be permitted to inspect and copy all pertinent records of the defendant at any and all reasonable times, provided, however, that the United States shall endeavor to minimize any inconvenience to the defendant caused by the inspection of such records.

4. This Court retains jurisdiction of this action for all purposes.

5. The Marshal shall forthwith serve a copy of this Order on defendant.

ORDERED this 29th day of January, 1980.

/s/ B. Avant Edenfield
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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3. This information should set out the number of units occupied by persons of each race. As a convenience for Mr. Worrell, the Court has appended samples showing the information required in the quarterly reports.

APPENDIX C

PORTION OF APPELLANT'S REPLY BRIEF TO FIFTH CIRCUIT COURT OF APPEAL

THE DISTRICT COURT ERRED IN CONSIDERING PLAINTIFF'S CIVIL CONTEMPT ACTION ON THE RECORD WITHOUT HEARING WITNESSES AND WITHOUT ALLOWING ME THE OPPORTUNITY TO PRESENT AND ORALLY ARGUE MY CASE BEFORE IT.

At the November 2, 1979, show cause hearing on whether or not this action should be dismissed for lack of prosecution, the district court, without ruling on the show cause order or so informing me of any decision the court has made in regard to that order, proceeded to ask the plaintiff to suggest ways that the court could proceed in the action. [Tr. #2, 6] The plaintiff stated that he would be willing to stipulate to the submission of the record. [Tr. #2, 6].

At this time the district court had at best a limited understanding of the previous hearing in this case. The court mistakenly believed that I presented witnesses on my behalf at the first evidentiary hearing held on June 30, 1978 [Tr. #2, 7] In fact I presented but one witness, and that witness was originally called by the plaintiff. Even the plaintiff indicated that I expressed doubt over how to proceed at the 1978 evidentiary hearing. [Tr. #2, 8] and that plaintiff could not recall whether or not I had even presented evidence in my behalf. [Tr. #2, 8] A review of the original civil contempt hearing reveals that even the district court was distributed over the lack of evidence presented in my behalf. [Tr. 107, 108, 110, 122, 123]

The district court asked me if I wanted a new evidentiary hearing. [Tr. #2, 10]. I insisted that the case should be dismissed in accordance with the show cause order to dismiss for lack of prosecution. [Tr. #2, 10, 11]. As I sought to finish my argument, the following exchange took place:

"Mr. Worrell: I'll finish right now.

The Court: No. You are finished. The question is - you have not answered it - do you want me to make whatever decision I'm going to make off the record or do you want a new evidentiary hearing? The Government says that it will submit for my determination its case on the record. Now, if you want an evidentiary hearing I'm going to allow a new evidentiary hearing and require the Government to bring its witnesses back.

Mr. Worrell: You mean on this charge, Your Honor?

The Court: On this charge.

Mr. Worrell: I'll leave it to the Court.

The Court: Well...

Mr. Worrell: You make your own choice, Your Honor.

The Court: Well, then, the Court is going to make its determination on the record."

[Tr. #2, 11, 12]

I understood that the 'charge' before the court was the issue of dismissing the action for lack of prosecution. I had no reason to believe that another evidentiary hearing would be held on this charge. To the contrary, it was my belief that the long delay in prosecuting the case spoke for itself.

At no time did I 'stipulate' that the contempt action should be submitted on the record. At the time of the original hearing I requested that I be given an opportunity to present rebuttal testimony and witnesses. [Tr. 122]. I again made this request to the district court upon discovery that the court had, without my knowledge and understanding, ruled upon the contempt action on the record of the previous hearing [letter to Judge Edenfield, December 26, 1979.]

In light of my confusion, the disputes over the quantity and quality of evidence before the district court, and plaintiff's inability to document a single act of discrimination, the defendant argues that the case should be remanded for fresh findings of fact and conclusions of law in accordance with *United States* v. *Northside Realty Associates, Inc.*, 474 F.2d 164 (5th Cir. 1973) *"Northside I"* and Federal Rule of Civil Procedure 63.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was mailed to counsel for respondent, Carl W. Gabel, Department of Justice, Washington, D.C. 20530, on this 30th day of May, 1981.

Charles W. Worrell

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Office - Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS
CLERK

No. 80-2074

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, the owner of an apartment complex in Georgia, was held in civil contempt for failing to comply with an injunction issued after he was adjudged to have discriminated on the basis of race in renting apartments, in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* Petitioner seeks review of the contempt order, but his contentions are clearly without merit. Accordingly, no further review is warranted.

1. In 1973, the United States brought suit against petitioner in the United States District Court for the Southern District of Georgia, alleging that he pursued a policy and practice of discrimination against blacks in the rental of apartments, in violation of the Fair Housing Act of 1968.

After a trial, the court entered judgment for the government. Petitioner was enjoined from committing further violations of the Act and was ordered to take certain remedial measures. He did not appeal (Pet. App. 1a-2a, 6a-7a).

In 1977, the government moved that petitioner be held in civil contempt for failing to obey the injunction. An evidentiary hearing was held, but the presiding district court judge died before issuing any findings of fact or conclusions of law (Pet. App. 7a). After the case was reassigned, a second district court judge held petitioner in contempt without conducting a new evidentiary hearing (*id.* at 13a), and the court of appeals affirmed (*id.* at 1a-4a).

2. Petitioner argues (Pet. 6-7) that the contempt order is invalid because the death of the first district court judge necessitated a new evidentiary hearing. It is settled that, if the parties agree, a new trial need not be held when a judge becomes disabled after trial but before issuing findings of fact and conclusions of law. *Arrow-Hart, Inc.* v. *Philip Carey Co.*, 552 F. 2d 711, 713 (6th Cir. 1977); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2922, at 340 (1973). See generally Fed. R. Civ. P. 63. Petitioner argues that he did not enter into such a stipulation, but the district court found that petitioner had done so (Pet. App. 7a) and the court of appeals agreed (*id.* at 2a n.1). It is the settled practice of this Court not to review concurrent findings of fact by the district court and the court of appeals in the absence of a very obvious and exceptional showing of error. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 16 (1978); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Petitioner has made no such showing here. On the contrary, the transcript of the relevant proceeding below shows that the lower courts' findings were

correct. See Nov. 2, 1979 Transcript at 6-11, *United States* v. *Worrell*, Civ. Action No. 3193 (S.D. Ga.).[1]

3. Petitioner also contends (Pet. 7-8) that the civil contempt order should be reversed because the underlying judgment was erroneous. It is true that a party cannot be held in civil contempt for failure to comply with an invalid order. *United States* v. *United Mine Workers*, 330 U.S. 258, 294-295 (1947). However, the validity of an underlying order can be attacked in a contempt proceeding only if the party charged with contempt had no earlier opportunity to do so effectively. *Maggio* v. *Zeitz*, 333 U.S. 56, 68 (1948); *United States* v. *Secor*, 476 F. 2d 766, 770 (2d Cir. 1973); 9 *Moore's Federal Practice* para. 110.13[4], at 168 (2d ed. 1980). In this case, petitioner had the opportunity to appeal the adverse judgment in the original civil rights action but failed to do so. As a result, the order became "*res judicata* and not subject to collateral attack in * * * contempt proceedings." *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 68.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[1] A copy of this transcript has been lodged with the Clerk of the Court.